No. 80-995

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In the Supreme Court of the United States

OCTOBER TERM, 1980

ETTA B. SAUNDERS, PETITIONER

v.

WILLIAM GRAHAM CLAYTOR, JR.,
SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Congress has waived the sovereign immunity of the United States in order to permit the addition of a cost of living "inflation factor" to a back pay award to a federal employee under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(c).

2. Whether the court of appeals properly reversed the district court's award of attorneys' fees for all time spent on two consolidated cases where, as the district court itself held, petitioner did not prevail in one of the two cases.

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STATEMENT

1. Petitioner was a civilian employee of the United States Department of the Navy in Alameda, California, from 1966 until 1973, when she was terminated as a result of a reduction in force (RIF) (Pet. App. 12a-14a, 27a-28a). She was employed as an aircraft metalsmith (*id.* at 13a). In 1972, the Secretary determined that she had been denied a promotion in her job on the basis of her sex, and she was given appropriate relief (*ibid.*). In 1973, petitioner applied for a vacant position as an Equal Employment Opportunity (EEO) Specialist (*id.* at 14a). Had she been chosen for the job, she would not have been terminated in the RIF (*id.* at 22a).

Petitioner filed two separate lawsuits against the government under Title VII of the Civil Rights Act of 1964, one challenging the RIF and the other challenging the Navy's failure to select her for the EEO position (Pet. App. 2a). In each suit, petitioner claimed that the government's action was based on unlawful discrimination on the basis of race or sex (*id.* at 2a-4a). After trial of the consolidated cases, the district court found that petitioner "failed to demonstrate by a preponderance of the evidence that she was RIFed on the grounds of her sex (female) or her race (Black)" (*id.* at 31a). However, in petitioner's separate action for denial of the EEO position, the district court found that she was denied that job as a "result of discriminatory and/or retaliatory animus" (*id.* at 25a). The district court awarded petitioner reinstatement with retroactive seniority and placement in the grade that the court determined she would have attained absent the discrimination (*id.* at 33a). Back pay was awarded, calculated on the basis of the promotions and step increases that the district court determined petitioner would have received (*id.* at 33a-34a). The government did not appeal the finding of liability or award of back pay relating to petitioner's failure to obtain the EEO position, and petitioner did not appeal from the judgment against her in the RIF action.

2. The district court declined to award interest on petitioner's back pay award (Pet. App. 34a), relying on *Richerson* v. *Jones,* 551 F. 2d 918, 925 (3d Cir. 1977), which held that sovereign immunity bars the award of interest on a back pay award against the federal government under Title VII. However, the district court added "a cost of living inflation factor" to the back pay award, based upon the average cost of living statistics of the United States Department of Labor (Pet. App. 34a-35a, 41a-42a).

Attorney's fees of $65,675.00 were awarded by the district court for time spent by counsel in petitioner's EEO action, on which she prevailed, and on her RIF action, in which the government prevailed (Pet. App. 44a-50a). The court stated that it was "irrelevant that [petitioner] did not 'prevail' on each issue tendered in the case" (*id.* at 47a).

3. The court of appeals reversed the award of the cost of living inflation factor, finding it barred by sovereign immunity. In the court's view, the inflation factor "is very similar to an award of interest in that both types of awards are meant to compensate the victim for the belated receipt of employment pay" (Pet. App. 7a). Because an award of interest "is not permitted under present law," the court found the award of the inflation factor adjustment equally prohibited, because it is "a disguised interest award" (*id.* at 8a).

The court of appeals also held that the district court erred in awarding attorney's fees for time spent on petitioner's RIF suit, stating (Pet. App. 10a):

> [Petitioner] had two separate pieces of litigation which were consolidated for trial purposes. She lost the RIF case. No issue raised in that case was sustained. She prevailed in the EEO case. This is the only case in which it is proper under the mandate of Congress to award a fee. The mere locking together of the two cases

under a consolidation order does not turn a lost case into one in which the party may be said to have prevailed.

The court remanded for a determination of a proper attorney's fee award based solely on the EEO case (Pet. App. 11a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of the courts of appeals. Further review by this Court therefore is not warranted.

1. Sovereign immunity precludes an award of monetary relief against the United States without its consent. *United States* v. *Testan*, 424 U.S. 392 (1976); *United States* v. *Sherwood*, 312 U.S. 584 (1941). Accordingly, it is axiomatic that "[a]part from constitutional requirements, in the absence of specific provision by contract or statute, or 'express consent . . . by Congress,' interest does not run on a claim against the United States." *United States* v. *Louisiana*, 446 U.S. 253, 264-265 (1980). Accord, *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48, 49 (1951); *United States* v. *N. Y. Rayon Importing Co.*, 329 U.S. 654, 658-659 (1947); *Albrecht* v. *United States*, 329 U.S. 599, 605 (1947); *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, 588 (1947). Mere general language is not sufficient to permit an award of interest. "The consent necessary to waive the traditional immunity must be express, and it must be strictly construed." *United States* v. *N. Y. Rayon Importing Co.*, *supra*, 329 U.S. at 659; *United States* v. *Goltra*, 312 U.S. 203, 207 (1941).

Title VII makes no express provision for payment of interest on back pay awards to federal employees, and the courts of appeals uniformly have denied interest in such cases even though interest may be available to private

employees under Title VII. *Blake* v. *Califano*, 626 F. 2d 891 (D.C. Cir. 1980); *de Weever* v. *United States*, 618 F. 2d 685 (10th Cir. 1980); *Fischer* v. *Adams*, 572 F. 2d 406, 411 (1st Cir. 1978); *Richerson* v. *Jones*, 551 F. 2d 918, 925 (3d Cir. 1977).[1] Even the district court in the instant case agreed that interest could not be awarded (Pet. App. 34a, citing *Richerson* v. *Jones, supra*).

The court of appeals correctly held that the inflation factor adjustment that the district court awarded "is a disguised interest award, which is not permitted under present law" (Pet. App. 8a). This ruling is consistent with *Blake* v. *Califano, supra*, which likewise held that an inflation factor is barred by sovereign immunity. 626 F. 2d at 895.[2]

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[1]For the same reason, interest has been denied on back pay awards against the government under the Back Pay Act, 5 U.S.C. 5596 (b)(1). *Fitzgerald* v. *Staats*, 578 F. 2d 435 (D.C. Cir.), cert. denied, 439 U.S. 1004 (1978); *Van Winkle* v. *McLucas*, 537 F. 2d 246 (6th Cir. 1976), cert. denied, 429 U.S. 1093 (1977).

[2]Contrary to petitioner's assertion (Pet. 13-20), there is no conflict between the decision in the instant case and any decision of this Court. The Court in *Brown* v. *GSA*, 425 U.S. 820 (1976), simply held that Title VII is the exclusive remedy for employment discrimination claims of federal employees. In *Chandler* v. *Roudebush*, 425 U.S. 840 (1976), the Court held that Congress intended the courts to hear Title VII claims of federal employees *de novo*. An "inflation factor" is certainly not mandated by *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), as petitioner claims (Pet. 19-20). That case involved private parties, not the federal government, and simply held that the private plaintiffs were entitled to recover back pay even though they did not request that relief from the district court until five years after their complaint was originally filed. Similarly, *Wicker* v. *Hoppock*, 73 U.S. (6 Wall.) 94, 99 (1867), relied upon by petitioner (Pet. 20), has nothing to do with the issues presented here. Only private parties were involved, and the Court merely held that the plaintiff was entitled to interest and costs as damages for breach of contract. Finally, to the extent that *Morton* v. *Mancari*, 417 U.S. 535, 547 (1974), is relevant, it supports the government. Although the Court stated that "*[i]n general*, it may be said that the *substantive* anti-discrimination law * * * applie[s] to the Federal Government * * *" (emphasis added), the holding was that Title VII and its legislative history did not reveal a congressional intent to repeal the statutory preference for hiring Indians at the Bureau of Indian

Moreover, like the appellant in *Blake* v. *Califano* (see 626 F. 2d at 895), petitioner has not cited a single case in which an inflation factor has been added to a back pay award even in an action against a *private* employer under Title VII, and we are not aware of any such case.[3] Thus, further review on this issue is unwarranted.

2. Congress provided that petitioner is entitled to recover attorney's fees against the government under Title VII only if she has substantially prevailed. 42 U.S.C. 2000e-5(k), 2000e-16(d); see *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). In this case, the court of appeals correctly held that petitioner is not entitled to an award of attorney's fees for work done on a case that she lost.

Petitioner filed two different lawsuits challenging two separate personnel actions that incidentally occurred at approximately the same time. We do not dispute that petitioner is entitled to attorney's fees for all of counsel's efforts reasonably related to prosecution of her suit challenging the denial of the EEO Specialist job, the cause of action in which she prevailed. Nor do we suggest that, because petitioner did not prevail on every theory advanced in support

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Affairs. Moreover, the present case concerns an issue of monetary relief, in which the federal government stands in a different position because of established principles of sovereign immunity, not a question of substantive Title VII law.

[3]Petitioner asserts that "the government has routinely * * * received[] adjustments to back pay to compensate for the effects of inflation * * *" (Pet. 19), citing *United States* v. *Lee Way Motor Freight, Inc.*, 625 F. 2d 918, 940 (10th Cir. 1979), and *EEOC* v. *Pacific Press Publishing Ass'n*, 482 F. Supp. 1291 (N.D. Cal. 1979). However, those cases involved relief against private defendants, not the government, and, in any event, the so-called "adjustments to back pay" were in fact "interest," not inflation factors *per se*. Indeed, the court in *EEOC* v. *Pacific Press*, *supra*, specifically rejected the request for an " 'inflation factor' based upon the Bureau of Labor Statistics Consumer Price Index * * *" (482 F. Supp. at 1319), precisely the relief petitioner seeks here.

of her challenge to denial of the EEO position, the fee award necessarily should be reduced.[4]

We submit only that petitioner cannot be compensated for counsel's unsuccessful efforts to establish that she was the victim of discrimination when she was included among 108 other employees who were RIFed by the Navy and that she cannot avoid this result merely because she joined this cause of action with a successful challenge to a distinct personnel action by the Navy.

Petitioner states that her "suspicion that there was a relationship between the RIF and the promotion denial proved correct" (Pet. 32). That assertion is refuted by the unchallenged decision of the district court that petitioner "failed to demonstrate by a preponderance of the evidence that she was RIFed on the grounds of her sex (female) or her race (Black)" or "in retaliation for having opposed alleged discriminatory employment practices and/or having filed a complaint against the agency" (Pet. App. 31a).

Thus, the court of appeals correctly implemented the congressional mandate that attorney's fees be awarded against the government only in a case in which the complainant has prevailed. Because petitioner lost her RIF case

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[4]For example, the district court found that petitioner was denied the EEO position she sought on the basis of her sex and in retaliation for her EEO activities and her earlier successful administrative discrimination claim (Pet. App. 30a). The court did not find any discrimination on the basis of race, even though this was alleged in petitioner's complaint (*id.* at 13a). We do not contend that counsel's compensable time must be reduced for that reason. Moreover, to the extent that there were issues of law and fact common to petitioner's distinct causes of action, petitioner may well be able to recover attorney's fees for the time her lawyer devoted to these issues in connection with the action relating to the EEO Specialist position, on which she prevailed. Only time spent on matters relating solely to the RIF case should be uncompensated.

against the government, the award of fees for counsel's work related to it has not been authorized by Congress.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1981

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[5]Because the present case involved challenges to distinct personnel actions by the Navy, it is unlike *Northcross* v. *Board of Education*, 611 F. 2d 624 (6th Cir. 1979), upon which petitioner relies (Pet. 35-36) in suggesting a conflict among the circuits. As the court below observed (Pet. App. 11a), "*Northcross* was a single case and the appellate court correctly held it to be improper to cull out and refuse a fee award for parts of the total issues raised, which were not persuasive in the reaching of the final decision."